

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

Docket No. **TSCA-08-2004-0006**

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| |) | |
| Kem Electric Cooperative |) | COMPLAINT AND NOTICE OF |
| 107 South Broadway |) | OPPORTUNITY FOR HEARING |
| Linton, North Dakota 58552 |) | |
| |) | |
| Respondent. |) | |
| <hr/> |) | |

COMPLAINT

1. This civil administrative enforcement action is authorized by Congress in section 16 (a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). The United States Environmental Protection Agency ("EPA") regulations governing polychlorinated biphenyls ("PCBs") authorized by TSCA are set out in part 761 of title 40 of the Code of Federal Regulations (CFR) and violations of the regulations constitute violations of the section 15 of TSCA, 15 U.S.C. § 2614 . The rules for this proceeding are the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Rules of Practice")," 40 CFR part 22, a copy of which is enclosed.

2. The undersigned EPA officials have been properly delegated the authority to issue this action.

3. EPA alleges that Respondent has violated section 15 of TSCA, 15 U.S.C. § 2614, and proposes the assessment of a civil penalty as more fully explained below.

NOTICE OF OPPORTUNITY FOR A HEARING

4. Respondent has the right to a public hearing before an administrative law judge to disagree with (1) any fact alleged by EPA in the complaint, or (2) the appropriateness of the proposed penalty.

5. To disagree with the complaint, and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk , U. S. EPA, Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202-2466, within 30 days of receiving this Complaint. The answer must clearly admit, deny or explain the factual allegations of the Complaint, the grounds for any defense, the facts you may dispute, and your specific request for a

public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in your answer.

FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT.

QUICK RESOLUTION

6. Respondent may resolve this proceeding at any time by paying the specific penalty proposed in the Complaint. Such payment need not contain any response to, or admission of, the allegations in the Complaint. Such payment constitutes a waiver of respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process. If Respondent chooses to resolve this proceeding by paying the specific penalty proposed in this Complaint, payment must be made, within thirty (30) calendar days of receipt of this complaint, by sending a certified or cashier's check payable to "Treasurer, United States of America," in care of:

U. S. EPA, Region 8
(Regional Hearing Clerk)
Mellon Bank
P. O. Box 360859M
Pittsburgh, PA 15251

A copy of the check must be mailed simultaneously to the attorney listed below.

SETTLEMENT NEGOTIATIONS

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact Mr. Dana J. Stotsky at 1-800- 227-9441, extension 6905 or the address below.

Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.

GENERAL ALLEGATIONS

The following general allegations apply to each count of this Complaint:

1. EPA has jurisdiction of this matter under section 16 of TSCA, 15 U.S.C. § 2615.
2. The Kem Electric Cooperative, (hereafter "Respondent"), is a cooperative association active and in good standing with the North Dakota Secretary of State's Office chartered

on April 5, 1944, and is therefore a "person" within the meaning of 40 C.F.R. § 761.3, and thus subject to regulation.

3. Respondent was, at all times relevant to this action, the owner and operator of the facility located at 107 South Broadway, Linton, North Dakota, 58552.
4. On or about October 8, 2003, Ms. Kim P. Le, an authorized EPA inspector, conducted an inspection of the facility, with the consent of respondent, to determine compliance with TSCA and EPA regulations relating to polychlorinated biphenyls (PCBs), 40 C.F.R. part 761. Notices of inspection and confidentiality were issued to representatives of respondent.
5. The EPA's PCB regulations define "disposal" of PCBs to include "spills, leaks, and other uncontrolled discharges of PCBs...." 40 C.F.R. section 761.3.
6. The PCB regulations require that PCBs, as defined at 40 C.F.R. section 761.3, be disposed of by the incineration or burial methods specified in the regulations. 40 C.F.R. section 761.60.
7. EPA's PCB regulations prohibit the use of "PCB Transformers" as defined at 40 C.F.R. Section 761.3, except as authorized by the regulations. 40 C.F.R. sections 761.20-.30.
8. Additionally, the PCB regulations specify various marking obligations imposed on persons possessing or storing PCB Articles. 40 C.F.R. sections 761.40(a) and 761.45(a).
9. These violations are outlined specifically in the counts below.

COUNT 1

10. At Respondent's facility, during the October, 2003, inspection, the Inspector observed one leaking PCB-contaminated PCB Article, Westinghouse serial number 69H9265, with a PCB concentration level of 152 ppm PCB. The leak was on the valve of the reactor, comprising an area of about 1 square foot. The leak did not extend to the ground.
11. Respondent's failure to properly dispose of the leaking PCBs described in the preceding paragraph, and as required by 40 C.F.R. § 761.60(a), constitutes a violation of section 15 of TSCA, 15 U.S.C., section 2614.

COUNT 2

12. In Respondent's open air yard, during the October, 2003, inspection, the Inspector

observed a leaking PCB-contaminated PCB Article, serial number 69H9265, stored without the required containment features specified in 40 C.F.R. section 761.65(b)(1)(ii).

13. The regulations at 40 C.F.R. section 761.65(b)(1)(ii), require, among other things, that PCB Articles stored for disposal must be placed in a containment area that has, among other features, a six inch curb, as well as a roof and walls.
14. Respondent's failure to properly store PCB Articles and PCB transformers in a containment area as described in the preceding two paragraphs, and as required by 40 C.F.R. section 761.65(b)(1)(ii), constitutes a violation of section 15 of TSCA, 15 U.S.C., section 2614.

COUNT 3

15. During the October, 2003, inspection, the EPA inspector observed that Respondent did not properly mark the PCB transformers and other PCB Articles stored at its PCB storage for disposal building.
16. The regulations at 40 C.F.R. section 761.45, require, among other things, that a large PCB mark be placed on PCB Articles, Equipment or Containers.
17. Respondent's failure to properly mark PCB Articles and PCB transformers, as described in the preceding two paragraphs, and as required by 40 C.F.R. section 761.45, constitutes a violation of section 15 of TSCA, 15 U.S.C., section 2614.

PROPOSED TSCA PENALTY

Section 16 of TSCA, 15 U.S.C. § 2615, as amended, and the regulations promulgated under section 6 of TSCA, 15 U.S.C. § 2605, authorize the assessment of a civil penalty of up to \$27,500 per day of violation for each violation of TSCA. Additionally, on February 13, 2004, the EPA Administrator caused to be promulgated, at 69 Fed Reg 7121, a Final Rule which implements the Civil Monetary Penalty Inflation Adjustment Rule, as mandated by the Debt Collection Improvement Act of 1996, and authorizes EPA to assess civil penalties of up to \$32,500 for TSCA violations occurring on or after March 15, 2004. Should EPA determine that violations alleged herein against Respondent did occur on or after March 15, 2004, **EPA provides this NOTICE** that it reserves its right for leave to amend any and all pleadings so that such pleadings are consistent with the revised penalty schedule authorized by 69 Fed Reg 7121 (Feb. 13, 2004).

In arriving at a penalty, EPA will take into consideration those factors required by section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(b), which include: the nature, circumstances,

extent, and gravity of the violation, and, with respect to respondent, the ability to pay, effect on ability to continue to do business, any history of prior violations, degree of culpability, and other matters as justice may require.

EPA's actions with respect to the assessment of civil penalties are guided by its Polychlorinated Biphenyls (PCB) Penalty Policy, dated April 9, 1990, which provides a rational and consistent method for applying the TSCA statutory factors to the circumstances of a specific case.

Pursuant to Section, Respondent may be assessed a penalty of up to \$27,500 per violation of TSCA. EPA is now proposing a specific penalty amount at this time, and does herein below provide a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint, as allowed by 40 C.F.R. § 22.14(a)(4)(ii):

| COUNT | PROPOSED PENALTY |
|-------------------------------|-------------------------|
| COUNT 1 | \$1,500 |
| COUNT 2 | \$3,000 |
| COUNT 3 | \$500 |
| TOTAL PROPOSED PENALTY | \$5,000 |

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 8,
Complainant.

Date: 9/23/04

By: **SIGNED**
Martin Hestmark, Director
Technical Enforcement Program

Date: 9/27/04

By: **David J. Janik**
Michael T. Risner, Director
David J. Janik, Supervisory Enforcement Attorney
Legal Enforcement Program
303-312-6917
janik.david@epa.gov

Date: 9/23/2004

By: **SIGNED**
Dana J. Stotsky
Senior Enforcement Attorney
Legal Enforcement Program
U.S. EPA Region 8
Colorado Bar # 14717
999 18th Street, Suite 300
Mail Code: 8ENF-L
Denver, Colorado 80202-2466
Phone: (303)-312-6905
FAX: (303) 312-6953
stotsky.dana@epa.gov

IN THE MATTER OF: Kem Electric Cooperative.
EPA Docket No.

CERTIFICATE OF SERVICE

I hereby certify that the attached COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING dated was served as follows:

The original and one copy was hand carried to:

Regional Hearing Clerk
U.S. EPA, Region VIII (8RC)
999 18th Street, Suite 500
Denver, CO 80202-2405

A copy was sent via CERTIFIED MAIL, RETURN RECEIPT REQUESTED, postage prepaid, to:

MICHAEL D RUDOLPH
Registered Agent for
Kem Electric Cooperative
107 S BROADWAY LINTON, ND 58552-7026

9/28/04
Date

SIGNED
Ms. Judith McTernan

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON SEPTEMBER 28, 2004.